NO. 82-1795

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., ET AL.,

PETITIONERS,

VS.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

RESPONDENT.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF OF RESPONDENT RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

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QUESTIONS PRESENTED

1. Whether federal regulations requiring operators of cable television systems to carry certain programming and forbidding them to edit that programming are unconstitutional on their face under the First Amendment.

2. Whether federal regulations of advertising on cable television which directly conflict with Oklahoma's prohibition of wine advertising are unconstitutional under the Twenty-First Amendment, as applied in this context.

3. Whether the limited protection afforded to commercial speech under the First Amendment outweighs Oklahoma's interest in discouraging the sale and consumption of intoxicating liquor.

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No. 82-1795

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October Term, 1983

CAPITAL CITIES CABLE, INC., et al.,

Petitioners,

vs.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENT RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

STATEMENT OF THE CASE

Long before Statehood, the Legislative Assembly of the Territory of Oklahoma enacted a code of laws regulating the sale, manufacture and distribution of alcoholic

beverages. Initially, traffic in all malt, spirituous or vinous, or any other intoxicating liquors was prohibited without express territorial permission. Okla. L. 1890, c. 48, § 6, p. 654. Licenses were issued to sell liquor only for restricted industrial, pharmaceutical and scientific endeavors, upon petition, display of reputable character and posting of a $2,000 bond. Okla. L. 1890, c. 48, § 1, p. 653-4. Further, prohibitions were enacted against the sale or distribution of liquor to minors, and insane or intoxicated persons, Okla. L. 1890, c. 48, §§ 8, 10, p. 655; selling liquor on Sunday or election day, § 14, p. 656; gambling, § 23, p. 659; or obstructing windows or doors where sold, § 25, p. 659. A cause of action was allowed against the illegal provider of such spirits where a person of intemperance became a charge of the county

or city, § 16, p. 656; and a remedy was provided the unforunate family of that charge, through which a convicted provider could be fined $500 per offense by civil action, § 15, p. 656.

When Oklahoma was authorized by Congress to enter the Union, Oklahoma Enabling Act of June 16, 1906; 34 Statutes at Large, p. 267, She was expressly enjoined, as a condition of Statehood, to prohibit by State law all traffic and commerce in intoxicating liquor, <u>including advertising</u>, for a period of twenty-one years, at least in that portion of the State which had previously been Indian Territory. Oklahoma Enabling Act, supra, § 3 (Second). In obedience to this dictate of Congress, the Oklahoma Constitutional Convention included the Prohibition Ordinance in the draft Constitution submitted to and approved by the people of

the State. It was drafted to include the entire State, rather than just Indian Territory, and prohibition of liquor, including its advertisement, became part of the fundamental law of the State.

Thereafter, the Legislature began to build a progressively more comprehensive structure of liquor regulations and restrictions, the vestiges of which are still readily apparent today in the Oklahoma Statutes. A State agency was soon created to purchase liquor for all legitimate purposes. Okla. L. 1907-8, c. 45, Art. I, § 3983, p. 883. In the same legislation, a section entitled "Prohibition" was enacted, making it unlawful for any individual or entity to:

> "[M]anufacture, sell, barter, give away, or otherwise furnish except as in this act provided, any spirituous, vinuous, fermented or malt liquor . . . which contain as much as one-half of one per centum of alcohol . . . capable of being used as a

> beverage, . . . <u>or to solicit the purchase or sale of any such liquors, either in person or by sign, circular, letter, card, price list, advertisement or otherwise, or to distribute, publish or display any advertisement, sign or notice where any such liquor may be manufactured, bartered, sold, given away or otherwise furnished</u>." § 4007, p. 887. (Emphasis added)

In 1926, the Legislature attacked the lucrative moonshining business, requiring all legal stills to be registered. Okla. L. 1926, Art. II-A, §§ 7039-8, 7039-9, pp. 656-7. The general advertising prohibition was repeated but with specific reference to stills for purchase. <u>Id</u>., § 7039-10, p. 657.

By 1931, the Legislature had developed an entire article dedicated to procedures for enforcement of liquor regulations, disposition of contraband, warrants, searches, and seizures. Okla. L. 1931, Art. V. In 1933, by constitutional amendment, importation of alcoholic beverages

into the State in contravention of its laws was prohibited. Okla. Const. Art. 21, § 2.

Subsequently, by special election, the first legal distinction between malt beverages and other liquor was made whereby any beverage containing over 3.2% alcohol was declared to be intoxicating and those beverages under 3.2% nonintoxicating. Okla. L. 1934, ch. 16, Art. III, § 2607, p. 150. With that distinction came an even more elaborate system of control of the industry. At this point the people of Oklahoma exhibited their continued concern over the potential for abuse of alcoholic beverages and made the prohibition against liquor advertising thereafter applicable only to intoxicating beverages. § 2618, p. 163.

The next twenty-five years produced only minor modifications of the methods

and procedures of liquor regulations. However, in the summer of 1959, and with an air of great caution, the people of Oklahoma voted to repeal liquor prohibition. The resulting amendment to the Oklahoma Constitution stands intact today in Oklahoma. Okla. Const. Art. 27.

Ten sections comprised Article 27, thereafter referred to as the Alcoholic Beverage Control Amendment. Open saloons, i.e., sales of liquor by the drink, were prohibited, as were sales of alcoholic beverages to minors, inebriates and insane persons, §§ 1, 4 and 5; sales were restricted to only certain days, § 6. Taxation was authorized as was the distribution of the funds collected, § 7. State and political subdivisions were ordered to stay out of the liquor business, § 8; and licensees were limited to noncorporate entities or persons, having continued

residence in Oklahoma for ten (10) years, who had neither violated any law related to liquor nor been convicted of any felony, § 10.

The people of Oklahoma also once more determined the prohibition of advertising was of constitutional import. Section 5 of that Amendment, at issue in this case, stated, in pertinent part:

> "It shall be unlawful for any person, firm, or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'"

Article 27 has remained unaltered since that time. The Legislature immediately enacted the Oklahoma Alcoholic Beverage Control Act to reflect the constitutional mandate. 37 O.S.Supp.1959, ch. 3. That chapter, with little substantive change, remains the law in Oklahoma.

A prohibition of substantially all advertising of intoxicating liquor, then, existed in Oklahoma prior to Statehood. Continuance of the prohibition was even forced upon Oklahoma by Congress as a condition of Statehood, for a period of at least twenty-one years, and has remained a part of the fundamental law of the State ever since.

Currently, in Oklahoma, wine and spirits, by definition, fall within the scope of the advertising ban. 37 O.S.1981, § 506(3). Advertising of strong beer, i.e., any beer in excess of 3.2% alcohol, is also included. All containers of such beer must properly display the alcohol content and are not to be promoted by advertisement if in excess of 3.2%. Id., § 540(b).

In 1980, the Oklahoma Attorney General, in response to a formal inquiry,

issued an opinion stating that retransmission of out-of-state liquor commercials by cable television operators operating in Oklahoma would be deemed a violation of State law. Oklahoma Attorney General Opinion No. 79-334 (March 19, 1980). Respondent Crisp, pursuant to said opinion, notified Oklahoma cable operators that they were in violation of § 516 and subject to prosection.

Petitioners operate cable television systems in Oklahoma. Depending on how the radio signals are received by Petitioners, they are regulated by certain FCC or copyright law provisions.

Petitioners herein make no claim that they receive any direct financial gain from the advertisements retransmitted by them. (Preliminary Injunction, p. 46). Nor do they indicate that monitoring and

deletion of those advertisements is impossible, asserting instead that it would be impractical to delete such advertising (J. A. p. 39). Presumably, this must simply mean that such deletion would cost them more than they wish to pay.

SUMMARY OF ARGUMENT

I

The provisions of the federal copyright law and Federal Communications Commission's regulations, which prohibit the deletion or alteration of broadcast signals retransmitted by cable operators, unconstitutionally interfere with cable operators' First Amendment rights to edit their program content. Accordingly, such federal laws are void and thus cannot be said to conflict with existing Oklahoma laws prohibiting liquor advertising.

II

Oklahoma laws regulating liquor advertising are a valid exercise of its Twenty-First Amendment powers, notwithstanding federal copyright and communications regulations with which such prohibition may conflict. This is consistent with the history and language of the Twenty-First Amendment as well as this Court's interpretation of that amendment. Oklahoma's power to regulate liquor advertising precludes federal regulatory interference because liquor advertising is one of the incidents in the sale of liquor which Oklahoma may totally prohibit and Oklahoma's laws were enacted to protect the health and welfare of her citizens against the evil incident to intoxicants. State liquor regulatory activity which directly serves this substantial State interest should not be infringed upon by federal

laws governing cable television even though such federal laws purportedly conflict with the State liquor laws.

This Court has held that when State laws enacted pursuant to the Twenty-First Amendment purportedly conflict with federal laws based on the Commerce Clause, a balancing test is employed to determine whether federal or State law prevails. Here, Oklahoma's overwhelming concerns for the health and welfare of its citizens substantially outweigh the opposing federal interest in fostering "Rapid, efficient, nationwide, and world-wide wire and radio communications service," and in the protection of liquor commercial copyrights.

Contrary to what Petitioners assert, neither the Communications Act nor the Copyright Act totally preempt the field of cable television regulation so as to

prohibit States from exercising their Twenty-First Amendment powers. Furthermore, to the extent that a Supremacy Clause question is nonetheless presented by virtue of the asserted conflict between such federal laws and Oklahoma's liquor advertising prohibition, a traditional preemption analysis is not applicable. Rather, a balancing of the federal and State's interest is necessary to resolve the issues before the Court. On balance, Oklahoma's substantial interest in discouraging the sale and consumption of liquor, by prohibiting liquor advertising, far outweighs any federal interest in the regulation of cable television present in this case.

III

The First Amendment aspects of this case present a narrow question of first impression before this Court. At issue is

whether a sovereign State may pursue public policy of discouraging the use of intoxicating liquor products, by prohibiting the advertisement of such products on cable television, in the absence of total prohibition of commerce in such products, and notwithstanding the limited, though substantial, constitutional protection afforded commercial speech under the First Amendment of the United States Constitution.

The advertising in question is delivered directly into the homes of the residents of the State through their television receivers. All such advertising originates outside of Oklahoma, and none of it deals specifically with the price or availability of liquor products within the State. The arguments of the Petitioners concede that the object of each individual advertisement is to increase the use and

consumption of the particular product represented, that is, to encourage its use.

Because the State's regulation is limited in application to a segment of the commerce in liquor products, it is entitled to a certain presumption in favor of its validity by virtue of the enhancement of the State's police power regulatory authority by operation of the Twenty-First Amendment. Balanced against this enhanced regulatory power are the interests of liquor advertisers and consumers, which, at best, lie at the very periphery of First Amendment concerns.

The First Amendment protection for these wine advertisements is, first, substantially attenuated because messages and information delivered directly into homes, unsolicited, and by electronic means, have always held a subordinate position on the scale of First Amendment values. Further,

various factors which have compelled protection of commercial speech in a variety of other circumstances are absent here. For example, the products here involved are not necessities in the same sense as prescription drugs, legal services or contraceptives might be deemed to be. Further, as the advertisements in question are devoid of price information, their relevance to informed economic decision making is marginal, at best.

Each of these factors, which serve to attenuate the degree of First Amendment protection to which these wine advertisements are entitled, proportionally enhances the degree of deference which should be afforded to the judgment of the people of Oklahoma that promotion of the sales of such products ought to be discouraged. Consequently, when the necessary balancing of the conflicting

constitutional interests is carried out within the framework provided by _Central Hudson Gas & Elec. Corp. v. Public Service Comm._, 447 U.S. 557 (1980), it must be concluded that, in this context, Oklahoma's prohibition of liquor advertising is valid and enforceable. Finally, the Petitioners' objections that Oklahoma's prohibition of liquor advertising, if enforced, will cause them to abaondon the program channel which include such advertising, thus serving to suppress expression other than such advertising, is simply not supported by the record. Therefore, the decision of the Tenth Circuit Court of Appeals should not be disturbed.

ARGUMENT

I. Federal laws and regulations prohibiting cable television operators from altering or deleting the content of television signals (including commercials) which they retransmit to their subscribers, unconstitutionally violate the First Amendment to the United States Constitution by totally prohibiting cable operators from exercising their editorial discretion regarding what programming their cable systems will carry. Because of their facial invalidity, such federal laws and regulations cannot be said to conflict with Oklahoma's liquor advertising restrictions.

As Petitioner Cox points out at page 5 of its Brief, federal laws prohibit cable television operators from altering the content of the television signals (including commercials) that they transmit to their subscribers. Section 76.55(b) of the FCC's rules, 47 C.F.R. § 76.55(b) (1982), requires that television programming transmitted by cable system "shall be carried in full, without deletion or

alteration of any portion." Additionally, Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3) expressly prohibits cable operators from willfully deleting a commercial advertisement from a television signal.

Petitioners, in seeking to avoid the dictates of Oklahoma's restrictions on liquor advertising, argue that they may not delete liquor advertising from their signals because of these federal laws. Reliance on these laws and regulations is, however, misplaced, as both the Federal Communications Commission's regulations and the Copyright Act's provisions violate the provisions of the First Amendment to the United States Constitution by totally eliminating cable operators' editorial function relating to the choice of programming which they carry.

As Capital Cities Cable admits, on page 33 of their Brief, various courts have held that the First Amendment protects cable operators' editorial choices in programming. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 43-51 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376 (10th Cir. 1981), cert. dismissed, 102 S. Ct. 2287 (1982); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1053-56 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979); Cruz v. Ferre, No. 83-330-CIV-WMH (S.D. Fla. August 2, 1983); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

In FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979), this Court recognized that cable operators have "a significant amount of editorial discretion regarding what their programming will include." In that case, this Court struck down FCC regulations that required cable operators to set aside certain channels for leased public access, and in so doing recognized that cable operators share with broadcasters a significant amount of editorial discretion, stating:

> ". . . Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, 'both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide.' Report and Order in Docket No. 20829, 69 F.C.C.2d 1324, 1333 (1978)." Id., 440 U.S. at 707.

The federal regulations and statutes relied upon by Petitioners to shield themselves against Oklahoma's restriction on liquor advertising completely negate the cable operators' editorial discretion -- both the regulations and the statute require that all television programming retransmitted be carried in full without deletion or alteration of any portion, including commercial advertisements.

This federally imposed elimination of the cable operators' editorial discretion makes cable operators mere passive receptacles or conduits of the programming signals transmitted to their subscribers. As such, the federal regulations and statutes violate First Amendment rights of the cable operators, and therefore are unconstitutional; this being the case, the restrictions are void and may not properly

be used as a shield to protect the operators from compliance with Oklahoma's restrictions on liquor advertising. E.g., Richardson v. United States, 465 F.2d 844 (3d Cir. 1972), cert. denied, 410 U.S. 955 (1973), cert. granted, 410 U.S. 953, reversed on other grounds, 418 U.S. 166; and Gary v. Spires, 473 F. Supp. 878 (D. S.C. 1978).

However, even if the federal statute and regulations in question were constitutional, such would not require that Oklahoma's prohibition of liquor advertising be struck down. Rather, the State's Twenty-First Amendment interests have to be balanced against the federal interests involved. As discussed in the following proposition, the State's interest in protecting its citizens from the evils incident to the liquor traffic far outweighs

the limited federal interest in this arena.

II. The Twenty-First Amendment and the State's historical authority over liquor sales within its borders should, in this case, be construed to permit Oklahoma to exercise that authority over liquor advertising without federal interference.

A. Oklahoma's laws regulating liquor advertising are a valid exercise of its Twenty-First Amendment powers and insofar as federal copyright laws and FCC regulations attempt to intefere with that authority, they are unconstitutional, as applied.

The Twenty-First Amendment is totally unique in the constitutional scheme in that it represents the only express grant of federal constitutional power to States. California v. LaRue, 409 U.S. 109 (1972). In other areas of State legislation or regulation, State power is ordinarily presumed to be limited by the Supremacy

Clause in the federal Constitution. United States Constitution, Article IV, § 2. However, State laws regulating the sale of intoxicating liquors possess a different constitutional status than other types of State regulation, and any analysis of the validity of Oklahoma's laws regulating liquor advertising where federal laws purportedly conflict may not proceed via a traditional preemption or Supremacy Clause analysis. Rather, any such anaylsis must begin with a presumption of State power, keeping in mind that where intoxicating liquors are concerned, the Twenty-First Amendment requires that great deference must be accorded to a State's regulatory efforts. Castlewood Intern. Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949 (1980), panel opinion reinstated, 626 F.2d 1200 (5th Cir. 1980). Such regulations

should also ordinarily be free from federal interference. Castlewood, supra. While the States have broad authority to regulate alcoholic beverages under their traditional police powers standing alone, Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971), "the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." California v. LaRue, 409 U.S. 109, 114 (1972).

There is no doubt that this was the purpose of the Twenty-First Amendment. As originally proposed, the Amendment contained three substantive sections, the third of which provided:

> "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933).

This third section was deleted because of concerns that it could be utilized to deprive the States of the power granted to them by the second section. As Senator Wagner pointed out, "We have expelled the system on national control through the front door . . . and readmitted it forthwith through the back door of Section 3." 76 Cong. Rec. 4145 (1933). The Amendment, therefore, was passed with only two sections. The first section repealed the Eighteenth Amendment which had established national prohibition, and the second, crucial here, specifies that:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The history and language of the Twenty-First Amendment makes it clear that Congress intended to give total control of commerce in liquor within their boundaries

to the States, while denying the same to the federal government. The power conferred upon the States by the Twenty-First Amendment has over the years been interpreted broadly, and has not been viewed as limited to importation and transportation of intoxicating liquors. Rather, the power to regulate has consistently been held to include all aspects of commerce in liquor. Thus, if the advertising of liquor products may properly be considered a component of liquor commerce within Oklahoma, it follows that the State's prohibition of such advertising falls at the center of Oklahoma's special regulatory prerogatives under the Twenty-First Amendment.

B. Oklahoma's liquor advertising laws preclude federal interference because liquor advertising is a component of the transportation of liquor for use in the State, over which Oklahoma possesses exclusive regulatory powers under the Twenty-First Amendment, as interpreted by this Court.

This Court has consistently intrepreted the State's Twenty-First Amendment powers expansively. California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97 (1980); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); State Board v. Young's Market Co., 299 U.S. 59 (1936). In Ziffrin, this Court stated that:

> "A State may protect Her people against evil incident to intoxicants . . . and may exercise large discretion as to the means employed." Id., at 138-139.

The means employed here by Oklahoma, that is, prohibiting liquor advertising on cable television, are directed at protecting Her people from the evil incidents of intoxicants and should not, in the absence of a direct and substantial federal interest requiring such result, be infringed upon by federal laws governing cable television, which were enacted by Congress and its agencies under the Commerce Clause,

supra, or the Copyright Clause, United States Constitution, Article I, § 8, cl. 8.

In State Board v. Young's Market Co., supra, this Court rejected the plaintiff's/wholesaler's contention that a State statute discriminated against the wholesalers of imported beer and thus violated the Commerce Clause, stating that:

> "States are totally unconfined by traditional Commerce Clause limitations in restricting the importation of intoxicants."

Likewise, in Midcal, supra, this Court, in interpreting State Board, supra, and its progeny, and quoting from Ziffrin, supra, stated:

> ". . . In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." Ziffrin, supra, at 138.

Implicitly then, this Court has recognized that a State's regulation of liquor sales necessarily encompasses the regulation of advertising which leads to liquor sales. Midcal, supra. This is consistent with the liquor advertisement decisions of other courts, which have recognized that liquor advertising is an incident of liquor sales:

> "Advertising is one of the incidents in the sale of liquours. If the state, under its police power, can prohibit the whole business from being carried on, it can prohibit and control any of its incidents. The prohibition against certain forms of advertising is really a prohibition against soliciting in the last analysis." Premier Pabst Sales Co. v. State Board of Health, 13 F. Supp. 90, 95, 96 (S.C. Cal. 1935). (Emphasis added)

The propriety of treating advertising as an incident or component of the commerce in liquor is also borne out by several studies which have examined the impact of alcohol advertisements and their relationship to increased consumption.

One recent study was "Content and Effects of Alcohol Advertising Report of Michigan State University Study." The study was sponsored by the Bureaus of Alcohol, Tobacco and Firearms, Federal Trade Commission, National Institute on Alcohol Abuse and Alcoholism, and Department of Transportation. In comparing the responses of two groups: those highly exposed to alcohol adverstisements versus those lightly exposed, the study noted that:

> ". . . Thirty-three percent of the highly exposed to 16% of the lows said they had at least five or six drinks at a sitting at least one day a week (1,7). The heavily exposed had gotten into trouble because of drinking more often than the lightly exposed (2, p.19). . . ."

Hence, because liquor advertising apparently does stimulate liquor use, it may properly be regarded as a component of the transportation and delivery of such liquor products within Oklahoma. Therefore, this

Court should continue its broad interpretation of the Twenty-First Amendment and uphold Oklahoma's liquor advertising laws, because advertising is part of the sale of liquor, which may be regulated by the State under its Twenty-First Admendment powers.

C. Oklahoma's laws prohibiting liquor advertising serve the State's clear and legitimate interest in protecting the health, welfare, temperance and safety of its citizens by discouraging the sale and consumption of intoxicants, and such laws are, therefore, properly within Oklahoma's special powers under the Twenty-First Amendment.

Under Section 2 of the Twenty First Amendment, Oklahoma has the power to totally prohibit the sale of liquor within its boundaries. New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) (per curiam); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939). Oklahoma also has the

concomitant power to regulate the times, places, and circumstances under which liquor may be sold. Bellanca, supra, 452 U.S. at 715. Moreover, within the power conferred by the amendment, Oklahoma may protect Her people against evil incident to intoxicants by prohibiting the advertising of such intoxicants. Ziffrin, supra, at 138-139. Such prohibition is part of a comprehensive regulatory liquor scheme.

Under this scheme, Oklahoma regulates the importation, wholesale and retail distribution of liquor throughout the State. This regulation is pervasive. See, Okla. Const. Art. 27; 37 O.S.1981, §§ 501-575 (ch. 3). Oklahoma also regulates the time, place and manner in which retail liquor may be sold at licensed "package stores." Open saloons are unlawful and private clubs are restricted both in their

manner and time of distribution of liquor. Consumption of liquor in any public place is unlawful in Oklahoma. Additionally, sale of liquor at any level is permitted at the exclusive sufferance of the State of Oklahoma, such permission being granted by a comprehensive licensing system. This complex and pervasive regulatory scheme was enacted within the State's broad powers under the Twenty-First Amendment and, as such, must be accorded great deference when, as here, interference with federal regulations is encountered.

Oklahoma's regulatory scheme serves a legitimate interest of the State -- that of protecting its citizens against the dangers and evil of alcohol consumption and abuse by discouraging the sale and consumption of liquor products. Alcohol abuse and alcohol related problems,

including related deaths, personal disability, crime, health impairment, and family disruptions are a significant problem in Oklahoma as documented in the study, "Alcohol Abuse in Oklahoma," Kerr Foundation, 1979. Significantly, the fastest growth by far in alcohol consumpton in Oklahoma has been of malt beverages, which are, under Oklahoma law, permitted to advertise. See, Okla. Const. Art, 27, § 2; Kerr Report, supra at Table 1, p. 9.

In enacting its constitutional and statutory provisions prohibiting liquor advertising, Oklahoma has accepted its responsibility to protect the health and welfare of its citizenry from the problems associated with the use of intoxicating liquor. The advertising prohibition is express and unambiguous. By these laws, Oklahoma has sought to prevent the artificial stimulation of the use of alcohol by

its citizens. Oklahoma's people and Legislature have always understood that liquor advertising bears a direct relationship to the attendant public health problems that inexorably accompany use of intoxicating liquors. The specific public health harm caused by the use of intoxicating liquors, which harm Oklahoma argues is increased directly, indeed statistically, by the commercial advertising of liquor, includes but is not limted to physiological harm, e.g., coronary heart disease, cirrhosis of the liver, and gastrointestinal cancer. The existence of a substantial State interest in discouraging the sale and consumption of intoxicating liquors in Oklahoma cannot be denied.

The Circuit Court in the Opinion Below properly recognized the substantial State interest involved, and following this Court's interpretation of State powers

under the Twenty-First Amendment properly upheld Oklahoma's alocholic beverage advertising prohibitions on two separate grounds:

> "First, the purpose of the advertising here unquestionably is to encourage sales of alcoholic beverages. As such, the advertising could be considered an incident of the sale of liquor which the state may regulate as it regulates sales themselves . . . . Alternatively, the laws are justified as one of the means, selected by an exercise of its broad discretion, by which Oklahoma has chosen to achieve the proper goal of protecting its people against the hrams incident to the use of alcoholic beverages." Cable-Com General, Inc. v. Crisp, 699 F.2d 490 (10th Cir. 1983).

These conclusions are consistent with the action by the Court when, just last term, this Court dismissed, for want of a substantial federal question, the appeal in Queensgate Investment Co. v. Liquor Control Comm., ___ U.S. ___, 103 S. Ct. 31 (1982). The Court of Appeals, in the Opinion Below, recognized the significance of the Queensgate decision, saying:

"In Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), the appellant, Queensgate Investment Co. (Queensgate), was a holder of an Ohio Liquor permit who was prosecuted for the violation of certain regulations of the Ohio Liquor Control Commission. the regulations in question prohibited off-premises price advertising by holders of certain liquor permits. The Commission rendered an order suspending Queensgate's license for one week for the violation of the regulation. Queensgate appealed on several grounds, including a contention that the regulation was an unconstitutional restraint on its First Amendment right to engage in commercial speech.

"The Ohio Supreme Court held that the asserted governmental interest, that of discouraging the excessive consumption of alcoholic beverages, was substantial and was well within the powers granted to the states under the Twenty-First Amendment. The court then held that since it was directed at controlling alcoholic beverages, not speech, the regulation did directly advance the governmental interest. Finally, the court held that the advertising of drink prices and price advantages would encourage the excessive consumption of alcoholic beverages; thus, the prohibition against such advertising was the narrowest method available to prevent such excessive consumption. Queensgate, supra at 69 Ohio St.2d 365-67, 433 N.E.2d 138.

"Queensgate filed a timely appeal in the United States Supreme Court. The only issue it raised there was whether the regulation violated the 'First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.' Jurisdictional Statement at 1, Queensgate Investment Co. v. Liquor Control Commission, ___ U.S. ___, 103 S.Ct. 31, 74 L.Ed.2d 45. The Liquor Control Commission filed with the Supreme Court a motion to dismiss the appeal on the ground that the question was so unsubstantial as not to warrant further argument. The basis for the motion was that an advertising prohibition was well within the scope of a state's powers under the Twenty-First Amendment, which permits a state to totally ban the sale of liquor, or otherwise 'minimize its evils.'

"On October 4, 1982, the Supreme Court dismissed the appeal 'for want of a substantial federal question,' Queensgate Investment Co. v. Liquor Control Commission, ___ U.S. ___, 103 S.Ct. 31, 7 L.Ed.2d 45 (1982).

* * * *

"In our view, Queensgate manifestly presented an issue concerning the First and the Twenty-First Amendments. The Supreme Court arguably may have decided the case on non-constitutional grounds; if so, however, we cannot discern them. It is our view that the Supreme Court decided Ohio's regulation was not an unconstitutional

> infringement on the appellant's First Amendment rights." (Footnotes omitted.) Cablecom-General, Inc. v. Crisp, 699 F.2d 490, 494-495, 497 (10th Cir. 1983).

As the Court of Appeals correctly realized, this Court, in Queensgate, recognized that prohibition of liquor advertising is within a State's Twenty-First Amendment powers, notwithstanding the presence of substantial federal interests arising under the First Amendment. Likewise, Congress' ability, under the Supremacy Clause, supra, to interfere with the exercise of such a State regulatory power is severely limited to very particular circumstances, which, as discussed in the next proposition, are not present in this case.

III. **When State laws enacted pursuant to the Twenty-First Amendment purportedly conflict with federal laws based on the Commerce Clause, this Court employs a balancing test to determine whether federal or State law prevails, and, on balance, Oklahoma's substantial interest in discouraging the sale and consumption of liquor products far outweighs any federal interest in regulation of cable television under the circumstances presented in this case.**

When a State law, enacted pursuant to the extraordinary regulatory power under the Twenty-First Amendment, is said to conflict with some act of Congress or federal regulation, the ordinary principles of preemption relied upon by the Petitioners under the Supremacy Clause, United States Constitution, Article VI, Clause 2, do not apply. Instead, any analysis of a contention that Okahoma's jurisdiction to regulate liquor advertising on cable television has been preempted by the federal

Communications Act, 47 U.S.C. §§ 151-609, and the federal Copyright Act, 17 U.S.C. § 111(c)(3), must begin by recognizing that the validity of this claim cannot be judged upon the usual basis of broad statements about the "comprehensive" nature of the regulations under those federal Acts. Rather, in determining whether State laws enacted under the Twenty-First Amendment are subject to federal preemption, this Court has developed a balancing test. Midcal, supra; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964). Thus, a traditional preemption analysis is not applicable here.

The Petitioners argue that where there is direct conflict between State and federal law, ipso facto, the State law must fall, citing Hines v. Davidowitz, 312 U.S. 52 (1941); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); and Florida Lime &

Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). This may be true in an ordinary case not arising under the Twenty-First Amendment. However, because the cases relied upon by the Petitioners for their Supremacy Clause arguments do not involve regulation of any aspect of liquor traffic, the ordinary mode of Supremacy Clause analysis employed in such cases, under which a conflicting State law must surely fail, is not applicable in the case at bar.

In Hostetter, supra, acknowledging that both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution, this Court ruled that "Like other provisions of the Constitution each must be considered in light of the other, and in the context of the issues and interests in any concrete case." Id., at 332. Thus, this Court has long expressly

recognized that a balancing of interests is necessary in cases of conflicting constitutional interests such as those presented here. This recognition is directly reflected in the analytical model utilized by this Court in resolving a similar conflict presented in the case of California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra.

In Midcal, supra, a California wine wholesaler had challenged the State's wine pricing scheme claiming a violation of the Sherman Act. California asserted that this regulatory scheme was protected by § 2 of the Twenty First Amendment. This Court invalidated the wine pricing scheme, but only after finding that the federal policy in favor of competition outweighed the State's asserted interests in liquor price maintenance -- the promotion of temperance and the preservation of small

retail establishments. Significantly, the Court in Midcal relied upon a finding by the California Supreme Court that the State's liquor pricing scheme did not inhibit the consumption of alcohol in that State. Id., 445 U.S. at 113.

Consequently, the issues before this Court may only be resolved by balancing Oklahoma's overwhelming concerns for the health and welfare of its citizens against the federal interests arising under the Communications and Copyright Acts, supra. Therefore, an examination of federal regulation of the cable television field under these Acts is necessary to determine if, in fact, such regulations and statutes may constitutionally prevent Oklahoma from exercising its Twenty-First Amendment powers under the circumstances of this case.

A. Communications Act of 1934

The Federal Communications Commission derives its regulatory authority from the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. The Act does not expressly provide for regulation of cable television, as the Act preceded the development of that medium. However, this Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), broadly construed the authority granted in the Communications Act as conferring upon the Commission the power to regulate cable television. That power is not absolute; it is limited to acts "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Id., 392 U.S. at 178. But, denial to a State of the right to exercise its Twenty-First Amendment powers by regulating liquor

advertising does not appear to be reasonably ancillary to the regulation of television broadcasting. Liquor advertising laws promulgated under the Twenty-First Amendment which directly address the protection of the public health fall instead within the most traditional concept of the police power. Ziffrin, Inc. v. Reeves, supra; Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983).

Instructive here is this Court's treatment of an analogous State advertising regulation which was upheld by this Court in Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). The case is analogous because New Mexico there, like Oklahoma here, had acted to protect the health and welfare of its citizens. In Head, appellants, a newspaper owner and a radio station owner were enjoined in State Court from accepting or

publishing within the State of New Mexico a Texas optometrist's advertising found to be in violation of New Mexico law. The appellants claimed that regulation of radio advertising had been preempted by the Communications Act of 1934. In rejecting that argument, this Court noted:

> "The purpose of this provision, according to the Supreme Court of New Mexico, is to 'protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." Id., 374 U.S. at 426.

The Court, in Head, ultimately resolved the question before it by concluding that the Communications Act had plainly evidenced no congressional intention to totally oust State regulatory authority in areas also regulated under that Act, and, in the absence of any direct conflict between the State advertising regulation and

some specific element of the federal law, upheld the New Mexico law.

Also important to this question of preemption by federal occupation of the field is the recent expression of the United States Congress' intention not to totally preempt the field of cable television regulation as evidenced by passage, in the United States Senate, of the proposed Cable Telecommunications Act of 1983. Senate Bill No. 66, 98th Cong., First Session (1983). The Act is Congress' most recent piece of legislation dealing with cable television communications. It was passed by the Senate on June 14, 1983, and amends the Communications Act of 1934, supra, as it specifically relates to cable television. Congressional Record June 14, 1983, p. S8325. Congress' intent not to totally preempt the field of cable television is

clear and manifest, especially where local legislation dealing with public health, safety, and welfare is concerned. Section 2(c) of the Act states:

> ". . . Any State or political subdivision or agency thereof, or franchising authority, may exercise jurisdiction over matters which are <u>necessary</u> for reasons of <u>public health, safety and welfare</u>." (Emphasis added.) <u>Id</u>., p. S8328.

Unlike <u>Head</u>, the case at bar does present a question involving direct conflict between specific federal regulations and a State prohibition of advertising. As discussed further below, resolution of that conflict depends upon a balancing of the competing State-federal interests, inasmuch as the Oklahoma advertising prohibition operates only in the area of State interest specially protected under the Twenty-First Amendment. Nevertheless, the ruling in <u>Head</u>, especially when it is viewed in light of recent congressional

actions in this field, destroys the force of the Petitioners' argument that Oklahoma's advertising prohibition must fail because regulation of cable television has generally been preempted by congressional occupation of this regulatory field.

B. The Copyright Act of 1976

Section 111(c)(3) of the Copyright Act requires cable systems to carry broadcast signals without deleting any material, including advertisements. In order for cable operators to comply with State law, they must delete or substitute wine advertisements shown on cable television. To do so would mean violating the Copyright Act. While the State and federal laws here do conflict, Congress has not intentionally preempted this field so as to forbid States from exercising their Twenty-First Amendment powers.

Section 301 of the Copyright Act which could be argued to demonstrate a congressional intent to preempt State law states:

> ". . . Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state."

However, this language demonstrates only Congress' intent to preempt State laws which attempt to create the same rights as those created by the Copyright Act. It shows no intent to otherwise totally occupy the field. Roth v. Partkin, 710 F.2d 934 (2d Cir. 1983). Here, Oklahoma's laws survive federal preemption because they are not attempting to create any right identical to those found in the Copyright Act. Oklahoma is merely attempting to exercise its Twenty-First Amendment powers to regulate liquor sales. Absent a congressional intention to occupy

the field, State regulations may be permissible. Goldstein v. California, 412 U.S. 546 (1973). Congress does not appear to have intended total frustration of State policies concerning the health and welfare of State citizens when adopting Section 111(c)(3). Congress' intent in adopting that section was to create a nationwide scheme of compulsory licensing. This intent would not be undermined if Oklahoma's liquor advertising laws were allowed to stand.

This Court has provided clear guidance with respect to the weight accorded to State regulatory interests in cases of this sort. In Goldstein v. California, supra, this Court held a California statute valid against a preemption challenge under the copyright law. The interests of California in particular and of federalism in general were given emphasis, and the

Court refused to read the Copyright Clause of the Constitution to foreclose the existence of all State power "to grant to authors the exclusive right to their respective writings." Id., at 560.

This Court also held that the 1909 Copyright Act did not preempt the California statute. In so doing, the Court stated:

> ". . . Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to exclusive federal control." (Emphasis original)

Clearly, the protection of health, safety and welfare of the citizens of Oklahoma is the type of purely local concern the Court spoke of in Goldstein, supra. These State interests need not give way to such a miniscule federal

interest as promotion of diversity in cable programming. Further, although the Copyright Act in question in Goldstein was the 1909 Act rather than the 1976 Act, Goldstein is still instructive here. For example, this Court, most recently in Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979), held that State contract law was not preempted by federal patent law, citing Goldstein v. California, supra, at 262. This Court stated:

> "State law is not displaced merely because the content relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law." Id., at 262.

This clearly shows this Court's willingness to examine the interests involved in a particular case to determine if federal or State law will prevail, even where Congress has partially preempted the field. Moreover, this Court did not

attempt to redefine its holding in _Goldstein_ despite Congress' comprehensive amendment of copyright law in the 1976 Act. This tends to demonstrate that _Goldstein_ is still viable precedent and may be controlling when discussing federal preemption under the 1976 Copyright Act.

Similarly, the Circuit Courts have continued to apply _Goldstein_ in this fashion after 1976 on questions of preemption. _See_, _Roth v. Pritkin_, 710 F.2d 934 (2d Cir. 1983) (holding that the rules of the 1976 Copyright Act are applicable retrospectively); _Moresburg v. Balyon_, 621 F.2d 972 (9th Cir. 1980) (holding that the California Resale Royalties Act was not preempted by the Copyright Act). Thus, the language of the Copyright Act and the Court's application of _Goldstein_ clearly dictate that Congress has not, by the Copyright Act of 1976, preempted this

field to the exclusion of the States, at least insofar as States, either by expressed intention or by total occupation, are empowered to regulate for the public health and safety of their citizens.

C. On balance, the federal interest in providing and protecting a nationwide cable system is substantially outweighed by Oklahoma's interest in promoting and preserving the safety, health and welfare of its citizens.

As discussed above, Congress has apparently never intended that States should be totally prevented and preempted from all regulatory activity with regard to the advertisements which may be carried upon cable television channels, by virtue of the federal regulatory systems embodied in and authorized by the Communications Act of 1934, supra, and the Copyright Act of 1976, supra. Nonetheless, there remains a

direct conflict between Oklahoma's prohibition of liquor advertising, insofar as it may apply to wine advertising on cable television, and these federal acts and the regulations adopted under them. In a sense, then, these apparent conflicts still present a question of preemption and application of the Supremacy Clause, supra.

However, the Commerce Clause, supra, pursuant to which the Communications Act was adopted, the Copyright Clause, United States Constitution, Art. I, § 8, cl. 8, pursuant to which the Copyright Act was adopted, and the Supremacy Clause are all part of the same Constitution as the Twenty-First Amendment, under which Oklahoma claims special prerogatives with regard to the regulation of liquor advertising.

> "Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." Hostetter v. Idlewild Bon Voyage Liquor Corp., supra, 377 U.S. at 332.

Consequently, because this is a Twenty-First Amendment case, whether the State-federal inconsistency exists by virtue of federal occupation of the field, or because, as here, of directly opposing provisions of law, the only proper approach to resolving the conflict is to conduct a balancing of the competing constitutional interests, as was done by this Court to resolve such a conflict in the case of California Retail Liquor Dealers Ass'n v. Midcal Aluminum Corp., supra.

The common experiences of daily life instruct us that there undoubtedly is physical harm directly caused to Oklahoma citizens by liquor use. The slaughter on

the State's highways caused by the intoxicated driver is the injury to innocents most commonly associated with alcohol use. But the other harms associated with the liquor traffic are legion, including such social problems as the abuse of children and other defenseless persons by a drunken parent, relative, spouse or friend.

There is also psychological harm to the drinker himself. "Loss of self-esteem" is a euphemistic phrase; what it translates to in reality is the familiar Skid Row derelict. In New York City, the milieu for such victims of the liquor traffic is called the Bowery; in Oklahoma City, it is known as "Reno Street"; but every urban area has its own Skid Row.

Further, there are many other emotional ills resulting from drinking, the effects of which range from divorce or domestic disputes to job absenteeism and

decreased productivity in the work force. When an Oklahoma worker is fired from his or her job because of drinking, that individual may become a ward of the State. The State may pay unemployment compensation to the now unemployed worker. Accordingly, the State must collect more unemployment insurance from employers. This in turn causes higher costs of goods. The ramifications are endless. These problems were all properly noticed by the Court of Appeals in the Opinion Below. Cablecom-General, Inc. v. Crisp, supra, 699 F.2d at 500.

Another common sense observation which can be made about the social evils inevitably incident to the traffic in intoxicating liquor is that the caseload of the State court system is substantially increased because of problems associated with drinking. What trial judge has not

presided over numerous criminal matters caused by intoxication, or handled divorces caused by alcoholism? How often do trial or appellate judges (as well as State or local juvenile agencies) deal with battered, abused or neglected children, because one or both of the parents abuse alcohol . . . and then abuse their children? How many personal injury lawsuits based upon an automobile accidents are traced to a drunk driver? Drinking affects amost every branch of State and local government, including the judiciary, as well as the citizenry at large.

The States, and each of them, have a very direct and real interest in all these numerous problems. Some States, including Mississippi and Oklahoma, have chosen to prohibit or significantly restrict the commercial advertisement of liquor seeking to discourage the sale and use of liquor

products by preventing the liquor merchants from encouraging such activity. These restrictions are well within the States' broad Twenty-First Amendment powers, as well as within the States' ordinary police powers. Dunagin v. City of Oxford, Mississippi, supra.

This Court must now balance the conflicting regulatory interests in question. In doing so, the primary balancing is of the relative harms involved. Arrayed against the numerous ills caused by liquor use, described above, which ills directly affect the State government and its citizens, are the federal copyright laws and federal communications regulations which interfere with the States' attempt to minimize the evils of intoxicants.

Certainly no social harm results if this Court declines to apply the federal regulations to compel carriage of liquor

advertising in Oklahoma. Further, as Oklahoma's advertising prohibition is narrow in scope, and is directed only at advertisements for intoxicating liquors, the impact upon any federal interest in a national communication system is *de minimus*, at best. Additionally, the primary purpose of the United States Constitution's Copyright Clause and the Copyright Act of 1976 is to protect authors from the unauthorized use of their creations, and to ensure that they, rather than others, will be the sole beneficiaries of their creativity. *See*, e.g., *Goldstein v. California*, supra. To this extent, then, Oklahoma's advertising prohibition, preventing, as it does, the use of such materials under limited circumstances, has, at most, a negligible impact upon the federal interests served by the copyright laws.

Moreover, the Respondent has found no indication, nor have the Petitioners suggested any, that either Congress or the FCC was mindful of liquor advertising in adopting the copyright laws and communications regulations here in issue. Insofar as such provisions of federal law now appear to conflict with Oklahoma's prohibition of such advertising, the conflict would appear to be entirely inadvertent, and unrelated to any federal interest which prompted the enactment of such laws and regulations by Congress and the FCC.

Therefore, this Court ought to conclusively strike the balance in favor of Oklahoma liquor advertising laws and hold the FCC regulations and copyright law here in question unconstitutional, as applied, under the Twenty First Amendment, by virtue of Oklahoma's supervening interest in discouraging the liquor traffic.

IV. Oklahoma's prohibition of liquor advertising is a lawful exercise of the State's enhanced police power under the Twenty-First Amendment and is constitutional under the First Amendment, when applied to prevent promotional advertising of wine on cable television.

A. Messages and information delivered, unsolicited, directly into the homes of citizens by electronic media are accorded less protection under the First Amendment than would exist for the same "speech" in some other context or medium.

In the case of Federal Communications Comm. v. Pacifica Foundation, 438 U.S. 726 (1978), this Court plainly recognized that government restrictions on expression which might be unconstitutional in some circumstances might, nonetheless, be valid where the expression is delivered via one of the electronic media. The Court made a number of points which emphasized and explained the subordinate position of the

electronic media under the First Amendment, stating:

> "We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.
>
> * * * *
>
> "The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.
>
> * * * *
>
> "Second, broadcasting is uniquely accessible to children, even those too young to read." Id., 438 U.S. at 749-751. (Citations omitted)

These important distinctions between electronic signals delivered directly into the home and other forms of communication are of central importance to analysis of

the commercial speech issues presented by the case at bar. The Petitioners present only a question regarding the validity of Oklahoma's prohibition of the liquor advertising delivered directly into Oklahoma homes through television receivers. Further, because the advertisements in issue are "commercial speech" as well, the Petitioners have no standing to challenge the constitutionality of the liquor advertising prohibition as it might apply to such advertising in any other medium. The overbreadth doctrine does not apply to cases involving only "commercial speech." Bates v. State Bar of Arizona, 433 U.S. 350, 379-381 (1977). Thus, the analysis of the First Amendment issues in this case must begin from the premise that the First Amendment presents a lesser restraint on the power of the State government to regulate the conduct of these Petitioners

because they seek to deliver the prohibited expression directly into private homes on television.

B. Because the wine advertisements which the Petitioners seek to disseminate free of State government interference are "commercial speech," the degree of constitutional protection to which they are entitled is further attenuated.

The cases of this Court have consistently recognized the common-sense differences between speech which does no more than propose a commercial transaction, and other forms of expression protected by the First Amendment. <u>Ohralik v. Ohio State Bar Assn.</u>, 436 U.S. 447 (1978). Little more than a generation ago, the presence of a commercial message, even when joined with political expression, was deemed by this Court to deprive the political speech of the First Amendment protection to which

it would have otherwise been entitled. Valentine v. Christensen, 316 U.S. 52 (1942). Since then, of course, there has been substantial evolution of the doctrine governing cases involving regulation of commercial expression. However, it remains settled that commercial speech is accorded a lesser constitutional protection than is other constitutionally guaranteed expression. Central Hudson Gas & Elect. Corp. v. Public Service Comm., supra, 447 U.S. at 563.

C. The wine advertisements which the Petitioners seek to disseminate in Oklahoma are devoid of most of the constitutionally significant characteristics which have weighed in favor of providing First Amendment protection for commercial speech in other cases.

In the handful of cases in which this Court has found it necessary to strike

down government regulations or prohibitions of various forms of commercial speech, there has always been substantial emphasis upon a number of characteristics of the commercial speech found worthy of protection and a recognition that these characteristics specially mitigated in favor of granting constitutional protection for the commercial expression under examination. In Bigelow v. Virginia, 421 U.S. 809 (1975), the commercial speech in question was an advertisement for abortion services, the provision and receipt of which are, themselves, activities entitled to a certain degree of independent constitutional protection. Roe v. Wade, 410 U.S. 113 (1973). Similarly, the privacy rights of consumers weighed in favor of allowing First Amendment protection for commercial advertising of contraceptives

in the case of <u>Carey v. Population Services International</u>, 431 U.S. 678 (1977). As recently as last term, the Court again recognized that First Amendment protection of commercial speech may be especially appropriate where the subject matter of such speech "relates to activity which is protected from unwarranted state interference." <u>Bolger v. Youngs Drug Products Corp.</u>, ___ U.S. ___, 103 S. Ct. 2875, 2881 (1983).

By contrast, the wine advertisements at issue in this case do not relate to activities which are themselves entitled to independent constitutional protection, but, quite the contrary, relate to activities which are peculiarly subject to unusually stringent government control under the Twenty-First Amendment. Thus, although there are constitutional values extrinsic to the commercial speech issue

present in this case, those values balance against, rather than in favor of, granting First Amendment protection for that commercial speech. See, California v. LaRue, 409 U.S. 109 (1972); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981).

The consumer interests in this case are also significantly different than those presented in the various cases where this Court has deemed commercial speech to be worthy of First Amendment protection. The products which are the subject of these wine advertisements are not vital necessities. The Court is not here being asked to protect consumers' rights to obtain information important to the protection of health, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976), to the preservation of legal rights, In re R. M. J.,

455 U.S. 1981 (1982), nor to protect their rights to learn where they might find a suitable residence, <u>Linmark Assoc. v. Twnshp, of Willingboro</u>, 431 U.S. 85 (1977). The general societal interest in the free flow of commercial information, present in any commercial speech case, is not, in this case, enhanced by any special or extraordinary consumer interest in or need for promotional wine advertising, and the Petitioners have offered no suggestion that the products they wish to have advertised are equal, on any relative scale of consumer values, to the kinds of products or services for which advertising has been protected by this Court.

It is also significant in this case that the wine advertisements in question cannot, under the circumstances of the case, be said to contain the kind of factual economic information which has been

central to the recognition of First Amendment protection for commercial speech in other cases. The advertisements which the Petitioners seek to disseminate in Oklahoma all originate outside of Oklahoma. They are obviously not provided directly by or on behalf of retail liquor stores or product manufacturers within Oklahoma, and do not pertain to specific terms of sale for any products available in Oklahoma. As these advertisements will generally consist either of brand name and image advertising, or of price advertising of specific products only available at remote locations outside of Oklahoma, the importance of these advertisements for individual consumer economic decision making is plainly marginal.

The Respondent recognizes that it is not necessary that commercial speech consist of price information, or any other

specific information in order for such speech to be entitled to a degree of First Amendment protection. Nonetheless, it remains plain under the cases that a closer nexus between the economic interests of consumers and the information in the advertisement justifies a relatively greater degree of constitutional protection for the information. Thus, in Bates v. State Bar of Arizona, supra, 433 U.S. at 364, the Court observed that:

> "Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." (Citations omitted)

To the extent the wine advertisements for which protection is sought in this case do not and cannot contain information

relating to specific economic decisions consumers will be called upon to make in the marketplace, it follows that the societal and consumer interests in protecting the flow of such information must be seen as relatively less substantial than the interests at stake in the cases where an advertiser seeks to inform a consumer of prices and locations where important and necessary products are available.

D. The Tenth Circuit Court of Appeals, in the Opinion Below, correctly balanced the competing constitutional interests at issue in this case, and properly concluded that Oklahoma's interest in discouraging the use of liquor is substantial, that a prohibition of liquor advertising directly advances such interest, and that no alternative form of regulation would serve such interest as well.

The Petitioners in this case have suggested that where a State has chosen to

completely prohibit some form of commercial speech, such a "blanket ban" should be deemed, apparently per se, as being unconstitutional under the First Amendment, if the commercial speech is truthful and not related to unlawful activity. See, Brief of Petitioner, Capital Cities Cable, Inc., pp. 14-15. The Petitioners' arguments also imply that the State of Oklahoma is necessarily under a heavy evidentiary burden to sustain its prohibition of liquor advertising, almost as if the regulation in question were subject to strict scrutiny, and would be unconstitutional unless the State could prove that its interest is compelling and that the prohibition in question is the narrowest possible means of serving such interest.

These arguments tend to show that the Petitioners apparently misperceive the

nature of the inquiry which must be undertaken in any commercial speech case, as well as that which is necessarily required when, as here, each side of the controversy is supported by counterpoised federal constitutional interests. In all such cases the use of a "per se" rule of decision is inappropriate, and instead it is required that the nature of the competing interests be carefully analyzed and that they then be balanced against one another.

In the case of Central Hudson Gas v. Public Service Comm'n., supra, 447 U.S. at 566, this Court described the framework within which any such balancing must occur, saying:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental

> interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

The Petitioners' arguments, therefore, must be interpreted as questioning whether Oklahoma's asserted interest in discouraging the use of liquor is substantial, whether the prohibition of liquor advertising directly advances that interest, and whether some regulation less intrusive than that prohibition could serve Oklahoma's interest as well.

1. Oklahoma has a substantial and proper State interest in discouraging the purchase, sale and consumption of wine and other liquor products.

The State of Oklahoma has always, to some greater or lesser extent, discouraged the sale and consumption of various liquor products. In fact, one of the conditions

under which Oklahoma was admitted to the Union required that total prohibition of liquor and of liquor advertising be continued for a period of twenty-one years after Statehood, in at least those portions of the State which had previously consisted of Indian Territory. See, Statement of the Case, supra at p. 3.

This Court has recognized the substantiality of States' interests in suppressing and regulating various aspects of the liquor trade in a variety of circumstances. The substantiality of Oklahoma's interest in this case is enhanced and accorded its own constitutional significance by the Twenty-First Amendment. Thus, analysis of a case involving a State law regulating or suppressing some aspect of the liquor trade must begin with a recognition of the State's special prerogatives under that Amendment. Seagram & Sons v. Hostetter, 384 U.S. 34, 41 (1966).

Contrary to the assertions of the Petitioners, the States' substantial interest in discouraging various aspects of the liquor trade have been held significant enough to overcome conflicting federal constitutional interests in a variety of circumstances, even where such federal interests arise under the First Amendment. Consequently, artistic performances which would otherwise be protected under the First Amendment, have been held to be properly prohibited by State law where they occur in places where liquor is served. New York State Liquor Auth. v. Bellanca, supra, 452 U.S. at 716.

More directly, just last term, this Court expressly, albeit without plenary consideration, recognized a State's substantial interest in discouraging the sale and use of liquor by enforcement of a prohibition of liquor advertising, when the

Court dismissed the appeal for want of a substantial federal question, in the case of Queensgate Investment Co. v. Liquor Control Comm., 433 N.E.2d 138 (Ohio 1982), appeal dismissed, ___ U.S. ___, 103 S. Ct. 31 (1982).

As the Tenth Circuit Court of Appeals properly recognized in the Opinion Below, it is beyond question that Oklahoma possesses a "legitimate and substantial interest" in pursuing regulatory policies which are based upon the common-sense observation that the use and abuse of alcohol can and does have a significant and adverse effect on the health and welfare of Oklahoma citizens, the safety of State highways, the stability of our families, and the productivity of the State's workforce. This interest is substantial under the ordinary police power of the State. Cablecom-General, Inc. v. Crisp, supra,

699 F.2d at 500. Further, the State's claim that this interest is substantial can only be enhanced by the force and effect of the Twenty-First Amendment, which accords constitutional recognition to the States' special interests in protecting their citizens from the social problems necessarily incident to the commerce in liquor products. See, Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-139 (1939). The constitutional recognition that States possess the right to totally outlaw all traffic in liquor products necessarily implies that States possess a substantial interest in discouraging the sale and use of such products.

2. **A prohibition of wine advertisements which encourage the increased use and sale of liquor products directly advances Oklahoma's substantial interest in discouraging the sale and use of such products.**

The Petitioners argue that even if the substantiality of Oklahoma's interest in discouraging liquor sales and use is conceded, the State has nonetheless failed to "prove" that a prohibition of advertising of liquor products "directly advances" that interest within the contemplation of the test enunciated in Central Hudson, supra. However, the argument overlooks the significant deference to which the State's legislative judgment is entitled in such cases.

A similar challenge to the sufficiency of the record on the issue of direct advancement was offered in the case of MetroMedia, Inc. v. San Diego, 453 U.S.

490 (1981). However, in that case, the Court held that the question of "direct advancement" turns upon whether the challenged legislative judgment can be judged to be rational, rather than upon whether it can be evidentiarily proven that the restriction in question in fact directly advances the substantial State interest. The Court stated:

> "The more serious question, then, concerns the third of the Central Hudson criteria: Does the ordinance 'directly advance' governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety.
>
> * * * *
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> ". . . [T]he California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is

nothing here to suggest that these judgments are unreasonable." Id., 453 U.S. at 508-509. (Citations omitted)

The question presented here, then, is whether the common-sense judgment of the people of Oklahoma, voting at a State-wide election, and even of the United States Congress, Oklahoma Enabling Act, supra, § 3, that liquor advertising should be prohibited because it encourages that which the State may rightfully discourage, is manifestly unreasonable. While the record in this case on the question of the reasonableness of this judgment is, indeed, meager, there is certainly nothing before the Court tending to establish that such judgment is "manifestly unreasonable." Id.

Further, as discussed above, a variety of factors justify substantially enhanced deference to this legislative judgment in this case. For example, in the case of

Bolger v. Youngs Drug Products Corp., supra, ___ U.S. at ____, 103 S. Ct. at 2284, this Court implicitly recognized the need for additional deference to such legislative judgments where the commercial speech in question intrudes into private homes via electronic media. This naturally follows from the subordinate position to which radio and television are relegated on the relative scale of First Amendment values. Additional deference is also warranted inasmuch as the State is acting here in pursuit of its special prerogatives under the Twenty-First Amendment. Thus, an additional presumption of validity attaches to the State's judgment that wine advertising encourages the sale and use of wine. California v. LaRue, supra, 409 U.S. at 118-119.

Oklahoma's judgment that prohibition of liquor advertising directly advances

the State's substantial interest in discouraging sale and consumption of such products is not manifestly unreasonable. The validity of such a judgment has been directly upheld by the Tenth Circuit Court of Appeals, in the Opinion Below, and by other Courts, as well. Queensgate Investment Co. v. Liquor Control Comm., supra, 433 N.E.2d at 142; Oklahoma A.B.C. Board v. Burris, 626 P.2d 1316 (Okl. 1980). The record and the arguments in this case provide no basis for setting that judgment aside.

3. No regulation of liquor advertising other than a prohibition of such advertising can serve as well to directly advance Oklahoma's substantial interest in discouraging liquor use.

The Petitioners suggest that Oklahoma's prohibition of wine advertisements on cable television is too drastic a means

of advancing the State's legitimate interests. However, this last element of the commercial speech balancing test enunciated in Central Hudson, supra, is also satisfied in this case.

Under the facts of this case, it is apparent that Oklahoma totally lacks any ability to regulate the liquor advertising in question in any way short of total prohibition which would also serve the State's substantial interests. Clearly, regulation of the content of such advertisements is completely impossible because all such advertisements originate outside of Oklahoma. Thus, Oklahoma has no way of insuring that such advertisements will not be misleading or will not encourage unlawful use of the products represented. Further, the limited resources available to State government in any event prevent, as a practical matter, the implementation of

any ongoing regulatory scheme for the review and approval of the content of such advertisements.

The Petitioners have only offered a single proposed regulatory alternative to Oklahoma's prohibition of liquor advertising. They suggest that the reintroduction of total liquor prohibition in Oklahoma would offer a less restrictive program of regulation in pursuit of the State's interest, but that argument is self-defeating. If Oklahoma were to reestablish the total prohibition of liquor and wine which existed in the State prior to 1959, the sale and use of the products which the Petitioners would have advertised in Oklahoma would, once more, be illegal. Subsequently, the advertisements for which the Petitioners seek constitutional protection would relate to unlawful activity and, accordingly, would fall completely outside

the limited protection afforded to commercial speech under the First Amendment. Pittsburgh Press Co. v. Comm. on Human Relations, 413 U.S. 376, 388 (1973).

With regard to the wine advertisements which the Petitioners seek to deliver into Oklahoma homes, either Oklahoma must permit them in their entirety, or prohibit them in their entirety. There exists no workable middle ground, and none has been suggested by the Petitioners. Therefore, Oklahoma may properly compel the deletion of wine advertisements contained in cable television programming, and it will be necessary for the Petitioners to develop the technical means by which this can be accomplished. In any event, Oklahoma must be permitted to prevent encouragement of that which the State has the undeniable right to discourage.

E. Oklahoma's prohibition of broadcast liquor advertising does not require either alteration or deletion of commercial or noncommercial programming content other than the liquor advertisements themselves.

As demonstrated above, Oklahoma's prohibition of wine advertising, which encourages the increased use and sale of liquor products, directly advances Oklahoma's substantial interest in discouraging the sale and use of intoxicating liquors. However, Petitioners also argue that Oklahoma's prohibition would not only require deletion of liquor advertising, but would also adversely impact other commercial and noncommercial programming. The record simply does not support Petitioners' contention.

Petitioners contend that Oklahoma's prohibition of liquor advertising would force cable operators to refrain from

carrying various out-of-state cable programs. However, the District Court record does not support this unfounded conclusion. Rather, the record reflects that it would indeed be possible to delete liquor advertising only. In fact, Petitioners' own witness, Ronald L. Marnell, of Multimedia Cablevision, Inc., testified that it would be possible to delete liquor advertising through the simple expedient of employing an operator to monitor the signal coming through a cable system:

> "Q. Now, what would a cable system need in order to be able to delete these wine commercials as they came in?
>
> "A. It would be my opinion that they would need an operator to monitor the signals coming through there rather than just having them come through unattended on every channel that you are going to monitor those commercials and attempt to delete them as they appear on the screen through some means." (J. A. p. 25)

Similarly, Wilburn L. Hammack of Cablecom-General, Inc., testified that it was possible for cable operators to delete liquor advertising:

"Q. Mr. Hammack, you say that you have no staff on outlaying towers; is that correct? Antennas?

"A. No, sir.

"Q. Are you saying it's impossible to have someone to staff those, if necessary?

"A. I would say it would be impracticable, not impossible.

"Q. The question was; is it impossible, sir?

"A. No, it's not impossible." (J. A. p. 39)

Admittedly, while most cable operators in Oklahoma do not presently employ the personnel or equipment necessary to delete liquor advertising, the deletion of such is not impossible. Nor is there any indication in the record that rather than deleting such messages, cable operators

would be forced to delete several or all out-of-state signals. Furthermore, the practicality of cable television commercial deletion was empirically tested by the Federal Communications Commission at a time when the Commission was considering adoption of a rule which would have required deletion of all commercials from distant signals, and such deletion, even using a totally manual system, was expressly found to be feasible. <u>Cable Television Report and Order</u>, 36 F.C.C.2d 138, 156 (1972).

In short, Petitioners' argument that Oklahoma's regulation, which merely requires deletion of liquor advertisements only, would somehow require cable operators to totally abandon or severely curtail the transmission of other content, is simply not supported by the record. This being the case, it cannot be said that

Oklahoma's regulations materially affect the dissemination of noncommercial or other commercial programming.

F. Conclusion

The Petitioners' case is based on the bizarre notion that although total prohibition of commerce in liquor may be constitutionally valid, partial prohibition is not. In reaching such conclusion, the cable broadcasters totally disregard the extent to which various factors attenuate their claims to First Amendment protection, and are insensitive to the State's special regulatory prerogatives under the Twenty-First Amendment.

However, because Oklahoma may lawfully seek to discourage the sale and consumption of liquor products, even where such activities are not themselves illegal, it must be recognized that the State may prevent the use of all of the sophisticated

tricks of Madison Avenue to instead encourage the use of such products. Oklahoma's ban on liquor advertising is a reasonable means of combating the rising liquor tide in the State, and is targeted only against those who would seek to raise that tide. The Opinion Below properly recognized this and ought to be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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